85-1624

No.

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1985

DAVID M. ROSENFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Should a valid indictment returned by a legally constituted grand jury be dismissed on the basis of willful violations of the secrecy provisions of F.R.Cr.P. 6(e)(2) brought to the court's attention by motion to dismiss before trial, and the court finds such violations to have occurred.

2. Where the government identified three tapes, but misrepresented their exculpatory contents, and this was learned only after the guilty verdict, should the court of appeals have remanded this issue to the district court for an evidentiary hearing.

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No.

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DAVID M. ROSENFIELD,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The bench opinion of Judge Clifford Scott Green of the United States District Court for the Eastern District of Pennsylvania dated November 16, 1984 is set forth in Appendix A. The opinion of the United States Court of Appeals for the Third Circuit entered on December 23, 1985 is set forth in Appendix B. The order denying the petition for rehearing filed February 19, 1986 is set forth in Appendix C.

JURISDICTION

The Court of Appeals entered its judgment on December 23, 1985. The order denying the petition for rehearing was filed February 19, 1986 which affirmed the district court's judgment in its entirety.

This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

RULE INVOLVED

Rule 6(e)(2) of the Federal Rules of Criminal Procedure:

> "(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph ([2]3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court."

STATEMENT OF THE CASE

I.

On July 18, 1984, petitioner David M. Rosenfield, an attorney, was indicted with another attorney, who later pled guilty, in a 47-count indictment charging violations of Title 18, U.S.C. §§ 1962(d), 1962(c), 1503 and 1341. The government sought

forfeiture under the RICO statute.

The indictment alleged that petitioner and others conspired to violate the RICO statute, 18 U.S.C. § 1962(c) by conducting their law firm through a pattern of racketeering in order to defraud insurance companies "by asserting false and fraudulent legal claims against them". This, according to the indictment, was done by paying money to "runners" for bringing in fictitious cases, *i.e.*, cases in which clients were willing to claim injury in non-existent automobile accidents and, in many cases, go to physicians for medical treatment of their alleged injuries.

It also alleged that petitioner and the other attorney defendant induced clients to see doctors "for medical treatment . . . they knew to be unnecessary". Petitioner alone was charged with inducing doctors "to exaggerate and overstate" medical treatments. The defendants and the co-conspirator William Mele were claimed to have induced and encouraged clients of the firm having legitimate cases to lie to insurance companies for the purpose of strengthening their legal claim to damages from the insurance companies.

Petitioner was found guilty by a jury of Counts One through Thirty-Eight and waived jury resolution of the forfeiture issue.

A forfeiture order was entered by the court, and on February 12, 1985, petitioner was sentenced to five years concurrent on Counts One, Two and Four through Thirty-Eight, and eighteen months under Count Three to run consecutively. The remaining counts were dismissed. Bail was continued.

The investigation, which resulted in this indictment was initiated by the Insurance Crime Prevention Institute ("ICPI"), whose agent, John Hoda ("Hoda") worked closely with postal inspectors interviewing grand jury witnesses, serving grand jury

subpoenas, and being completely privy to secret proceedings of the grand jury. More than a year prior to this indictment, Judge Norma L. Shapiro, in a *related grand jury matter in the same investigation, In re Grand Jury (Intervenors J.H. and D.H.),* No. 82-349, ruled on February 2, 1983 that:

> "The government's right to disclose to government personnel pursuant to Fed.R.Crim.P. 6(e)(3)(A)(ii) *does not include agents of the Insurance Crime Prevention Institute, a non-governmental body.*"

The grand jury in this case began its investigation on November 4, 1982 and from its inception, Hoda was informed of witnesses who were to appear "before" the grand jury, and what such witnesses would testify "before" the grand jury. He knew when indictments were being handed down, and who the grand jury was investigating and the manner in which that investigation was proceeding. He kept an official log, where his entries revealed his knowledge of what transpired in the grand jury room.

The log revealed that *the day following* Judge Shapiro's ruling, Hoda and the U.S. postal inspectors violated its terms, and such violations continued throughout February and March 1983.[1]

Petitioner seasonably filed a pre-trial motion to dismiss on the ground of violation of the grand jury secrecy requirements of F.R.Crim.P. 6(e)(2) and a hearing was held. On November

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1. With regard to this log, the Court of Appeals found that the district court's disregard of the log was not clearly erroneous. "Nonetheless", the Court of Appeals held, "the fact that the agent kept the log suggests the potential for abuse when non-government personnel are provided access to activities related to the grand jury." (9a).

16, 1984, the court denied the motion to dismiss finding "no direct disclosure of what occurred inside the grand jury", but also finding that:

> . . . at the time the persons were interviewed there *was certainly a reasonable basis for belief that these matters would be summarized to the grand jury and in that regard Mr. Hoda indeed became knowledgeable of information which had the potential for being brought to the grand jury*, and I believe that would constitute a disclosure of matters occurring before the grand jury." (3a) (italics added).

The Court of Appeals acknowledged that ". . . some confidential material may have been disclosed . . ." (7a) but affirmed the conviction since petitioner failed to demonstrate prejudice. However, petitioner demonstrated that the grand jury disclosures were other than an isolated incident, and he did this by proving:

(a) that the same type of conduct involving ICPI agents occurred before a grand jury in the Western District of Pennsylvania, *United States v. Lichtenstein,* 131 Pittsburgh L.J. 85 (W.D. Pa. 1982);

(b) that since the decision in *United States v. Tager,* 638 F. 2d 167, 168 (10th Cir. 1980) (involving ICPI agents) the government has been on notice that grand jury disclosures to such agents carries the risk of dismissal of the indictment; and

(c) that a federal judge of the United States District Court for the Eastern District of Pennsylvania, the Honorable Norma L. Shapiro, in a related grand jury investigation, specifically ruled the government has no right to make disclosures to ICPI agents

and despite such ruling disclosures were nevertheless made to Hoda.

Though presented by petitioner to the Court of Appeals, none of these factors were considered by the court in affirming petitioner's conviction since petitioner could not demonstrate "prejudice".

II.

Another critical issue in this case was whether petitioner knew of the spurious cases handled by other lawyers in his law office.

The principal witness against him was William Mele, described in this indictment as a "legal administrator" in the law firm. Though he admitted lying in the federal criminal prosecution against him,[2] Mele was permitted to testify, over objection, that 75% of the cases in petitioner's office were phony, and petitioner knew this.

After the guilty verdict, petitioner became aware of facts unknown to him prior to and during the trial regarding taped statements by Mele. The information could not have, and did not, become available to him or his counsel because of affirmative actions of the government prosecutor. His trial counsel submitted an affidavit attesting to what he was told by the Assistant United States Attorney regarding these tapes.

Prior to trial, the government turned over to petitioner's counsel two tapes of recorded conversations between William Mele and Jack J. Bulkin, Esquire. Trial counsel was then informed

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2. Mele was convicted on December 14, 1983, and his conviction was affirmed by memorandum opinion of the United States Court of Appeals on May 6, 1985.

there were at least three other taped conversations between these two persons, but was told by the prosecutor the other conversations were not relevant and his request for production was denied. Some time after conviction, petitioner learned that the non-disclosed tapes contained material that would tend to prove his innocence, namely Mele's admission that petitioner had no knowledge of the spurious cases being handled in his office. Petitioner requested the Court of Appeals to remand on this issue.

The Court of Appeals found no *Brady* violation and refused to remand for an evidentiary hearing dismissing this argument as being without merit.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted because the Court of Appeals for the Third Circuit in affirming petitioner's conviction has:

1. Countenanced repeated violations of grand jury secrecy under Federal Rule of Criminal Procedure 6(e)(2), brought to the attention of the trial court before trial by a motion to dismiss the indictment.

2. Failed to properly apply *Brady v. Maryland,* 373 U.S. 83 (1963) by ignoring *United States v. Bagley,* ____ U.S. ____, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), which required the court to decide whether the failure of the prosecution to turn over the three tapes undermined confidence in the outcome of the trial.

BACKGROUND

A. Abuse of Grand Jury Secrecy

In *United States v. Mechanik,* 474 U.S. ____, 38 Cr. L.R.

3122, 3123, n. 1 (Feb. 26, 1986), the Court recently observed that "No long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings . . . ."

While *Mechanik* involved a violation of F.R.Cr.P. 6(d), this Court, nevertheless, did leave open the question of "[W]hat remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial." 474 U.S. ____, 38 Cr. L.R. at 3124.

Petitioner submits that the same concerns regarding Rule 6(d) apply to the violation of grand jury secrecy under Rule 6(e)(2). Here, violations were brought to the attention of the court before trial and a finding of improper disclosure was made. No remedy of any kind was imposed against the government; the trial court merely admonished the prosecutor even though the rule itself provides the remedy of contempt for "a knowing violation".

Neither *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) nor *United States v. Baggot*, 463 U.S. 476 (1983) — the two most recent cases to discuss disclosure under Rule 6(e) — address the question whether dismissal of the indictment should be granted where the trial court is made aware of serious violations substantially before trial commences; the record discloses persistent violations of the "long established policy that maintains the secrecy of the grand jury proceedings in the federal courts". *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) quoted in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 at 424; and it is clear the government has been placed on notice by prior rulings as to the illegality of disclosures to insurance industry representatives.

The violation and abuse of this grand jury's secrecy was thus,

more than an isolated or sporadic incident as the Court of Appeals found but was "entrenched and flagrant", occurring in this case, the case in the Western District of Pennsylvania, the related case in the Eastern District of Pennsylvania, and in *United States v. Tager* in the Tenth Circuit — and each instance involved the *identical private party* — the Insurance Crime Prevention Institute — to whom the disclosures were made by either government prosecutors or postal inspectors.

This should result in a punitive sanction against the prosecution including the possibility of dismissal of the indictment. Instead, the Court of Appeals was content with a precatory warning that "Future lapses, should they become routine or are arguably prejudicial to individual defendants, will be examined with close scrutiny." (9a). These are the " 'purely ceremonial' words of appellate displeasure" criticized by Mr. Justice Marshall in his dissent in *United States v. Mechanik, supra,* at 3127. They invite governmental abuse.

The analysis by the Court of Appeals in this case for weighing the consequences of a violation of grand jury secrecy effectively renders the rule a dead letter. *See United States v. Mechanik, supra* (Concurring Opinion, O'Connor, J., Brennan, J., and Blackmun, J.), 474 U.S. ____, 38 Cr. L.R. at 3124. The concurring Justices recognized that dismissal of the indictment is "clearly envision[ed]", 38 Cr. L.R. at 3124, where a violation "impair[s] the substantial rights of the accused." and this should be determined by an examination of the effect of the violation on the indictment not the verdict. Once the indictment is returned, it would be impossible to demonstrate that a convicted defendant has been prejudiced by a grand jury violation — and this would effectively nullify the rule establishing secrecy.

The flawed analysis by the Court of Appeals was compounded by the failure to follow its own precedent in *United States v.*

Serubo, 604 F. 2d 807, 817-18 (3rd Cir. 1979) where it ruled:

> " . . .that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, *and to protect defendants from abuse of the grand jury process.*" (italics added).

Serubo, which followed *United States v. Riccobene,* 451 F. 2d 586 (3rd Cir. 1971), was the Third Circuit's most forceful pronouncement on grand jury abuse. The government was given fair warning that the court, in the exercise of its supervisory powers, would "order the dismissal of the indictment as a remedy for prosecutorial misconduct before the grand jury." *Id.* at 816. Judge Gibbons further observed that:

> "prejudice to the individual defendant has never been required in order to justify the exercise of the supervisory power." *Id.* at 817.

Dismissal of the indictment, the court noted, " . . .may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand jury process." *Id.* at 817.

While grand jury violations in *Serubo* did not involve secrecy violations, other courts confronting such violations have ordered dismissal. *See United States v. Gold,* 470 F. Supp. 1336 (N.D. Ill. 1979); *United States v. Tager,* 638 F. 2d 167 (10th Cir. 1980) (involving ICPI agents); *United States v. Kilpatrick,* 594 F. Supp. 1324 (D. Colo. 1984). This petition presents the unresolved question in this Court of whether dismissal of the indictment is warranted where the violations are presented to the trial court sufficiently in advance of trial, and the secrecy transgressions are found to have occurred with sufficient regularity as to stigmatize the grand jury process.

B. Violation of *United States v. Bagley*

Two weeks before deciding this case, the Court of Appeals in *United States v. Ferri,* 778 F. 2d 985, 997 (3rd Cir. 1985) ruled that where the government fails to "disclose that testimony used to convict the defendant was false . . . " then if there "is any reasonable likelihood that the false evidence could have affected the jury's judgment" it would be material. Recognizing that this determination can only be made in a "fact-bound" inquiry conducted at the district court level, the Court of Appeals remanded in *Ferri.*

The identical situation was presented by petitioner in this case with regard to the tapes not turned over by the government involving discussions between Mele, the principal witness against petitioner, and another attorney. The result was different, and no reason was given for not following its own precedent.

When the prosecution withholds important exculpatory material, justice is flaunted. In *United States v. Polizzi,* 500 F. 2d 856, 893 (9th Cir. 1974), the court held that "The prosecution is obligated to disclose to the defense statements falling within the Jencks Act [18 U.S.C. § 3500] regardless of anyone's perception of the utility of the statements for impeachment." *cert. denied,* 419 U.S. 1120 (1975). Impeachment evidence plays a pivitol role in a criminal trial, *see, e.g., Davis v. Alaska,* 415 U.S. 308 (1974) and withholding such evidence deprives a defendant of an effective defense. This is so particularly where the non-disclosure, as here, involved a witness who supplied the critical evidence against the petitioner. *See Giglio v. United States,* 405 U.S. 150, 151 (1972).

The analysis in this case of *Brady v. Maryland,* 373 U.S. 83 (1963) by the Third Circuit panel ignored *United States v. Bagley,* ____ U.S. ____, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), although *Bagley* was the linchpin of *Ferri.*

Under *Bagley* and under *United States v. Agurs,* 427 U.S. 97, 104 (1976), evidence is material where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* at 105 S. Ct. 3384. The panel here should have decided whether suppression of the Meie-Bulkin material "undermined confidence in the outcome of the trial", or at the very least followed their own precedent in *Ferri* and remanded for a "fact-bound" inquiry to permit the district court to decide "in the first instance what the government knew and whether it violated its duties to [petitioner] under *Brady*." *Ferri, supra,* 778 F.2d at 997.

The Court of Appeals failed to do either.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT F. SIMONE
HARRY LORE
Attorneys for Petitioner

APPENDIX A — BENCH OPINION OF NOVEMBER 16, 1984

[Commencing at page 44]

* * *

There's presently before the court a motion seeking the dismissal of the indictment and motion to suppress evidence at the time of trial. At the thrust of the motions are that there have been abuses of the grand jury process, and more particularly Rule 6(e)(2), in that persons to whom disclosure is permitted under 6(e) to have further disclosed what occurred before the grand jury, and the person identified is essentially the post inspector, Mr. Trovarello.

I find as a fact that the postal inspector and the representative of ICPI commenced an investigation into possible mail fraud as a result of certain information being forwarded to the postal inspector by the ICPI representative, Mr. Hoda; that thereafter the ICPI on behalf of its member insurance companies and on behalf of companies whose records were accessible to ICPI, made certain disclosures to the government concerning the names of persons involved, certain file information and certain of this information was relied upon in presenting the matter to the grand jury. There is certainly no abuse of grand jury process in regard to the presentation of evidence by ICPI to the postal inspector which is later submitted to the grand jury.

[45] It is said that there is a 6(e)(2) violation

by reason of disclosure. It is clear that there is no evidence of record that actually what occurred before the grand jury was in fact disclosed to Mr. Hoda or any other person by any person who was committed to receive the information. Mr. Trovarello never, as I understand it, told Mr. Hoda anything what occurred before the grand jury, so there is no direct disclosure.

The basic thrust of the defendant's position is that information concerning witnesses, the names of witnesses and the identity of witnesses subpoenaed, the interview of certain witnesses subpoenaed for exemplar productions and thereafter summation of certain of the witnesses' interview, constitutes a disclosure in that Hoda was present at service of subpoenas and occasionally at the interview of the witness subpoenaed pursuant to the subpoenas to present handwriting or fingerprinting exemplars.

I find that in the context of this case where the person present is the person who sought on behalf of his client to initiate an investigation and to have supplied the government with the names of persons involved in potential mail fraud that his appearance after the grand jury subpoenas were served represents not a disclosure under 6(e)(2), while I believe that prudence would dictate that the government take steps not to have even the representative of the victim present at any [46] stage, including the grand jury stage. It certainly does not represent a disclosure under the facts of

this case.

The presence at the interviews, although they were not taken pursuant to subpoenas to appear for testimony to the grand jury, the presence of Mr. Hoda after the interviews gives me greater problems. If at the time the interview was actually taken there was no belief or intention to submit the material to the grand jury, I would think that it would merely be a part of the investigative process and that there would be no disclosure under the rule. However, it appears to me that at the time the persons were interviewed there was certainly a reasonable basis for belief that these matters would be summarized to the grand jury and in that regard Mr. Hoda indeed became knowledgeable of information which had the potential for being brought before the grand jury, and I believe that that would constitute a disclosure of matters occurring before the grand jury.

Having found at least one area of disclosure, the question is what remedy is appropriate. Certainly there is no evidence of record in this case that there is any prejudice whatsoever to the defendant, so that there is no basis for dismissal of the indictment because of prejudice to the defendant.

It is argued that this is such an abuse of grand jury process that the indictment should be dismissed in order to deter future grand jury abuse. As I noted in the discussions [47] with Mr. Turner,

Appendix A

I cannot find from this record that such drastic action as dismissal is necessary to prevent any future grand jury abuse. Certainly there is no evidence whatsoever that Mrs. Ainslie was involved in any type of impropriety in presenting evidence to the grand jury. To the extent that the interview process constitutes an impermissible disclosure, it's clear that I should be able to call the matter to the attention of the United States Attorney and that corrective action could be taken short of dismissal of the indictment. Accordingly, I decline and deny the motion to dismiss the indictment.

It is said that certain information was received by the grand jury and out of the totality of the grand jury process certain search warrants issued and that certain evidence was there received pursuant to search warrants and it was thereafter disclosed to Mr. Hoda. It appears to be no doubt that at least checks and certain journals of certain escrow accounts were in fact disclosed to Mr. Hoda. Under the circumstances of this case as presented to me at this particular time, there seems to be no basis for suppressing that evidence. It is not argued that there was not probable cause for the initial search and the obtaining of the warrant and the obtaining of the evidence and the disclosure to Mr. Hoda to advance the investigation and prosecution of the case was not under any legal authorized suppression of the evidence. Accordingly, I will deny the motion to suppress the evidence [48] disclosed to Mr. Hoda.

Appendix A

The final matter before the court is the defendant's motion to dismiss the indictment because of the abuse of the grand jury subpoena, and that's a supplemental motion for the reasons set forth, and my statement at the close of the arguments or my statements to counsel I do not find that there was an abuse of the issuance of subpoenas for handwriting exemplars, fingerprints, photographs to the various witnesses and I therefore find no basis to grant the relief requested by the defendants. Accordingly, I will deny the supplemental motion to dismiss the indictment.

* * *

APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1106

UNITED STATES OF AMERICA,

Appellee

v.

DAVID M. ROSENFIELD,

Appellant

On Appeal from the United States District
Court for the Eastern District of Pennsylvania
Crim. No. 84-00305-01

Submitted Pursuant to Third Circuit
Rule 12(6) December 5, 1985

Before: ADAMS, *Acting Chief Judge,*
GIBBONS and STAPLETON,
Circuit Judges.

(Filed December 23, 1985)

OPINION OF THE COURT

Appendix B

Per Curiam

David M. Rosenfield, a Philadelphia attorney, appeals from his conviction for taking part in a scheme to recover fraudulent insurance claims for fictitious automobile accidents. He was charged with a conspiracy count under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962(d) (1982), a substantive RICO violation under 18 U.S.C. § 1962(c), obstruction of justice under 18 U.S.C. § 1503, and 34 counts of knowing participation in fraudulent insurance claims under 18 U.S.C. § 1341. After he was convicted on all counts, the district court on February 12, 1985 sentenced him to six and one-half years in prison. On appeal, Rosenfield challenges his conviction on grounds of prosecutorial misconduct, primarily claiming violations of grand jury secrecy. Although we believe that some confidential material may have been disclosed, Rosenfield had not established that he was prejudiced by any alleged breach. We therefore affirm.

Rosenfield's appeal focuses primarily on the relationship between a federal investigator from the United States Postal Inspectors and an agent of the Insurance Crime Prevention Institute (ICPI), a private anti-fraud unit created by insurance companies. John Hoda, the ICPI agent, alerted the government to possible fraud by Rosenfield's firm, and subsequently assisted Postal Inspector James Trovarello in his investigation. According to the government, Hoda's principal role was to identify copies of insurance files that were of interest to the investigation, and deliver them to Trovarello. In addition, Hoda was present, or waiting in the car, when 36 grand jury subpoenas were served by postal inspectors, thus enabling him to learn the identity of grand jury witnesses. Hoda was also present when some 37 people were interviewed by postal inspectors. In about ten of these

instances, according to the government, the interview took place after the person had complied with a grand jury subpoena demanding handwriting examples and fingerprints, and in approximately five or six of these instances, the person's statement was subsequently summarized to the grand jury.

Under Fed. R. Crim. Proc. 6(e)(2), participants in the grand jury "shall not disclose matters occurring before the grand jury . . ." Although an exception allows the government to disclose grand jury matters to government personnel, *see* Fed. R. Crim. Proc. 6(e)(3)(a)(ii), it is conceded that the private ICPI does not come within that exception. The district court determined that allowing Hoda to be present while interviews with witnesses were being conducted, even outside the grand jury, constituted a disclosure because the government had a "reasonable basis for belief that those matters would be summarized to the grand jury." The government, however, argues that Rule 6(e) applies only to interviews that actually occur before the grand jury, not to extra-grand jury interviews that may later be submitted to the grand jurors. Rosenfield also maintains that there was a second breach: he insists that enabling Hoda to learn the identities of witnesses before the grand jury transgressed Rule 6(e). *See Fund for Constitutional Government v. National Archives,* 656 F.2d 856 (D.C. Cir. 1981).

We need not resolve these contentions, however, because even assuming these were violations of grand jury secrecy, reversal of the convictions is not warranted. An abuse of the grand jury by the prosecution merits dismissal of the indictment only where the defendant is actually prejudiced, or "[t]here is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends or that the type of misconduct challenged has become entrenched and flagrant in the circuit."

Appendix B

United States v. Serubo, 640 F.2d 807, 817 (3d Cir. 1979), *quoting United States v. Birdman,* 602 F.2d 547, 559 (3d Cir. 1979).

Here, Rosenfield does not appear to contest the district court's finding that there was no evidence of "any prejudice whatsoever to this defendant." Nor is there any evidence that the alleged disclosures were motivated by sinister ends, or are " 'entrenched and flagrant' in the circuit." *Id.* At worst, a postal inspector—and not the assistant United States attorney—erred in sharing too much information with an investigator from a private organization.

At the same time, however, we wish to reaffirm the importance of maintaining grand jury secrecy, *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 219 (1979), and to caution prosecutors and government investigators against future transgressions. In this case, the government displayed questionable judgment in allowing Hoda access to information arguably within the scope of the disclosure prohibition of Rule 6(e)(2).[1] Future lapses should they become routine or are arguably prejudicial to individual defendants, will be examined with close scrutiny.

Rosenfield also challenges his conviction on the ground that the government abused its subpoena power under Fed. R. Crim. P. 17, and that it failed to disclose exculpatory material as

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1. In addition to the alleged disclosures already noted. Hoda kept a log during the course of the two-year investigation and his entries suggest that he may have had knowledge of such grand jury matters as when indictments would be issued. Rosenfield argued this was also evidence of disclosure. The district court, however, did not credit the log, and we do not believe this finding is clearly erroneous. Nonetheless, the fact that the agent kept the log suggests the potential for abuse when non-government personnel are provided access to activities related to the grand jury.

required by *Brady v. Maryland,* 373 U.S. 83 (1963). We have carefully reviewed the record, and find that there is no merit to these contentions.

Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C—ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 85-1106

UNITED STATES OF AMERICA,

Appellee

v.

DAVID M. ROSENFIELD,

Appellant

(Crim. No. 84-00305-01)

SUR PETITION FOR REHEARING IN BANC

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who

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concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ A. M. Adams
Circuit Judge

Dated: February 19, 1986

Supreme Court, U.S.
FILED
JUN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1624

In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID M. ROSENFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his conviction should be reversed on the grounds that there was a breach of grand jury secrecy and that the government failed to disclose exculpatory *Brady* material.

1. a. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); one count of obstructing justice, in violation of 18 U.S.C. 1503; and 34 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to a total of six and one-half years' imprisonment and ordered to forfeit his interest in the enterprise—his law firm. Pet. App. 7a. The court of appeals affirmed (*id.* at 6a-10a).

The evidence at trial, the sufficiency of which is not challenged, showed that petitioner, an attorney, was a principal in a scheme to use his law firm to file fraudulent automobile insurance claims involving millions of dollars. Petitioner and William Mele, the legal administrator of the firm, hired people called "runners" to stage phony automobile accidents and to direct the "victims" to petitioner's firm. Once the "victims" were retained as clients on a 50% contingency fee basis, petitioner reviewed their files to determine how much to pay the "runner." After the "victims" were referred to physicians who were also involved in the scheme, phony medical records were compiled, and bogus insurance claims were filed. Between 1979 and 1982, the scheme generated over $4 million in fees for petitioner's firm, of which petitioner personally received at least $1.6 million. After the federal investigation began, petitioner destroyed records of payments he had made to confederates in connection with the operation. C.A. App. 721-732, 757-770, 1104-1106, 1167-1181, 1321-1329, 1437-1441, 1510-1512, 1643-1647, 1682-1693.[1]

b. The federal investigation was begun when John Hoda, an agent of the Insurance Crime Prevention Institute, alerted authorities to petitioner's scheme. Hoda then assisted Postal Inspector James Trovarello in the investigation. As the court of appeals noted (Pet. App. 7a-8a):

> Hoda's principal role was to identify copies of insurance files that were of interest to the investigation, and to deliver them to Trovarello. In addition, Hoda was present, or waiting in the car, when 36 grand jury

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[1]Mele and Elliot Raskin, an associate in petitioner's firm, were convicted at separate trials and testified for the government at petitioner's trial. Numerous other individuals involved in the scheme, including "runners" and physicians, were charged in several separate indictments and convicted.

> subpoenas were served by postal inspectors, thus enabling him to learn the identity of grand jury witnesses. Hoda was also present when some 37 people were interviewed by postal inspectors. In about ten of these instances, * * * the interview took place after the person had complied with a grand jury subpoena demanding handwriting examples and fingerprints, and in approximately five or six of these instances, the person's statement was subsequently summarized to the grand jury.

Prior to trial, petitioner moved for dismissal of the indictment on the ground that Hoda's participation in the investigation provided him with grand jury information and thus violated the secrecy of the grand jury under Fed. R. Crim. P. 6(e)(2). After a hearing, the district court denied petitioner's motion (Pet. App. 1a-5a). The court first found that there was no evidence that "what occurred before the grand jury was in fact disclosed to Mr. Hoda * * *. Mr. Trovarello never * * * told Mr. Hoda anything [that] occurred before the grand jury, so there is no direct disclosure" (*id.* at 2a). The court also held that Hoda's presence when grand jury subpoenas were served, from which he learned the identities of prospective grand jury witnesses, did "not represent a disclosure under the facts of this case" since Hoda was "the person who sought on behalf of his client to initiate an investigation and to have supplied the government with the names of persons involved in potential mail fraud" (*id.* at 2a-3a). However, the court concluded that a "greater problem[]" (*id.* at 3a) arose from Hoda's presence at the interviews of witnesses who had been subpoenaed to furnish handwriting or fingerprint exemplars (*ibid.*):

> [T]he interviews * * * were not taken pursuant to subpoenas to appear for testimony to the grand jury * * *. If at the time the interview was actually taken there was

> no belief or intention to submit the material to the grand jury, I would think that it would merely be a part of the investigative process and that there would be no disclosure under the rule. However, it appears to me that at the time the persons were interviewed there was certainly a reasonable basis for belief that these matters would be summarized to the grand jury and in that regard Mr. Hoda indeed became knowledgeable of information which had the potential for being brought before the grand jury, and I believe that that would constitute a disclosure of matters occurring before the grand jury.

Even though it believed that disclosure had occurred in this respect, the district court concluded that the remedy of dismissal was not appropriate. The court found that "[c]ertainly there is no evidence of record in this case that there is any prejudice whatsoever to [petitioner], so that there is no basis for dismissal of the indictment because of prejudice to [petitioner]" (Pet. App. 3a). In addition, the court determined that "such drastic action as dismissal is [not] necessary to prevent any future grand jury abuse. * * * To the extent that the interview process [used by the postal inspector] constitutes an impermissible disclosure, it's clear that I should be able to call the matter to the attention of the United States Attorney and that corrective action could be taken short of dismissal of the indictment" (*id.* at 4a).

c. On petitioner's appeal following his conviction at trial, the court of appeals affirmed the district court's ruling denying the motion to dismiss the indictment (Pet. App. 6a-10a). The court of appeals found it unnecessary to resolve the government's contention that Hoda's presence during the interviews did not constitute disclosure under Fed. R. Crim. P. 6(e)(2) because the interviews had not occurred before the grand jury (Pet. App. 8a). Instead, the court held that, even assuming Rule 6 had been violated, the

remedy of reversal of the conviction and dismissal of the indictment was not warranted.

Under Third Circuit precedent, "[a]n abuse of the grand jury by the prosecution merits dismissal of the indictment only where the defendant is actually prejudiced, or '[t]here is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends or that the type of misconduct challenged has become entrenched and flagrant in the circuit' " (Pet. App. 8a (bracket in original), quoting *United States* v. *Serubo*, 604 F.2d 807, 817 (1979)). In this case, the court noted, petitioner did not contest the district court's finding that the Rule 6(e) violation, if any, did not prejudice him in any way (Pet. App. 9a). The court also noted that there was no evidence "that the alleged disclosures were motivated by sinister ends, or are ' "entrenched and flagrant' in the circuit." At worst, a postal inspector—and not the assistant United States attorney—erred in sharing too much information with an investigator from a private organization" (*ibid.* (citation omitted)). However, while affirming petitioner's conviction, the court "reaffirm[ed] the importance of maintaining grand jury secrecy" and "caution[ed] prosecutors and government investigators against future transgressions." The court added that "[f]uture lapses should they become routine or * * * arguably prejudicial to individual defendants, will be examined with close scrutiny." *Ibid.*

Petitioner also argued that the government failed to disclose exculpatory materials under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that a remand to the district court was needed to resolve that issue. The government's brief (at 18-20) demonstrated that petitioner had failed to substantiate his claim and that his allegations were unfounded. The court of appeals concluded that "there is no merit" to petitioner's contention (Pet. App. 10a) and held that a remand was unnecessary.

2. This Court's recent decision in *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986), forecloses petitioner's contention that his conviction should be reversed because of the alleged breach of grand jury secrecy. In *Mechanik*, the Court held that the harmless error standard of Fed. R. Crim. P. 52(a) applies to violations of Fed. R. Crim. P. 6 and that a petit jury's verdict following an error-free trial renders it inappropriate to set aside a conviction because of defects in the grand jury process. As the Court explained (slip op. 5, 7 (footnote omitted)):

> [T]he petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.
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> * * * * *
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> We hold * * * that however diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation. In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings.

Mechanik is controlling here and requires affirmance of petitioner's conviction. Indeed, the harmlessness of the error in this case is clear: petitioner does not even assert that the alleged violation of Rule 6(e)(2) resulted in prejudice to him at trial or, for that matter, in the grand jury

proceeding, and both courts below found that there was no such prejudice.[2]

Furthermore, even apart from the decision in *Mechanik*, an alleged breach of grand jury secrecy would not entitle a defendant to dismissal of an indictment or reversal of a conviction. As discussed in our brief in *Mechanik* (at 28-29), the rules of grand jury secrecy serve a number of purposes designed to promote the effective operation of the criminal justice system and to protect innocent suspects who are investigated but not charged by the grand jury. A defendant who has been indicted and convicted has no personal stake in those policies that would entitle him to raise a violation of Rule 6(e)(2) as a basis for dismissal or reversal. See *United States* v. *Navarro-Ordas*, 770 F.2d 959, 968 (11th Cir. 1985), cert. denied, No. 85-1086 (Feb. 24, 1986).

3. Although he had not raised the issue in the district court, petitioner argued on appeal that the government failed to disclose exculpatory *Brady* material at trial. He now contends that the court of appeals erred in not remanding this issue to the district court.

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[2]The court of appeals indicated (Pet. App. 8a) that under *United States* v. *Serubo*, 604 F.2d 807, 817 (3d Cir. 1979), a court has supervisory power to dismiss an indictment even in the absence of prejudice to the defendant if the alleged misconduct was " 'something other than an isolated incident unmotivated by sinister ends or * * * has become entrenched and flagrant in the circuit.' " However, as we argued in our brief in *Mechanik* (at 40-44 & n.56), a copy of which is being sent to counsel for petitioner, and as the Court's decision in *Mechanik* reflects, the remedy of dismissal is inappropriate if the alleged defect in the grand jury did not prejudice the defendant. In any event, the court of appeals correctly held (Pet. App. 9a) that dismissal was not warranted under *Serubo* because the asserted violations of Rule 6 were neither "motivated by sinister ends" nor " ' "entrenched and flagrant" in the circuit.' "

Petitioner's claim is insubstantial and does not warrant this Court's review. As explained above, the government's brief in the court of appeals showed that petitioner had failed to support his allegations and that no *Brady* violation had been established. In these circumstances, the court of appeals correctly concluded (Pet. App. 10a) that "there is no merit" to petitioner's contention and that a remand was necessary.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1986

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[3]Petitioner asserts that in declining to remand the case, the court of appeals failed to follow its earlier decision in *United States* v. *Ferri*, 778 F.2d 985, 997 (3d Cir. 1985). Of course, a claim that a court of appeals has departed from its own precedents provides no basis for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, the defendant in *Ferri*, in contrast to petitioner, presented independent evidence to support his argument that the documents in question were both exculpatory and material and that the government had knowingly suppressed them.